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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. BRANDON JOSEPH WHITT, Defendant and Appellant.	D075153 (Super. Ct. No. RIF1604811)

APPEAL from a judgment of the Superior Court of Riverside County, John D. Molloy, Judge. Affirmed.

Richard de la Sota, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Brandon Whitt committed various crimes, including first degree murder and attempted murder, during an unsuccessful firearm sales transaction.

The jury found defendant personally and intentionally discharged a firearm. (Pen. Code, § 12022.53, subd. (d).)[1] The jury also found true a special circumstances allegation that defendant committed the murder during a robbery. (§ 190.2, subd. (a)(17)(A).) The court sentenced defendant to life without the possibility of parole, plus 57 years to life, and a three-year determinate term.

As his sole appellate contention, defendant contends the court erred in failing to sua sponte instruct the jury on imperfect self-defense to potentially reduce the crimes to voluntary manslaughter and attempted voluntary manslaughter. The contention is without merit because there was insufficient evidence supporting the imperfect self-defense theory. Additionally, there was no prejudicial error because the court's instructions on felony murder and premeditated murder, together with the jury's special circumstance finding, show the jury would have convicted defendant of first degree murder and attempted murder even without the claimed instructional error.

FACTUAL AND PROCEDURAL SUMMARY

In September 2016, Roy R. told defendant he was selling two firearms: an AK-47 and a revolver. Roy did not own the weapons but was helping the owners sell them. After defendant expressed interest in purchasing these items, they planned to meet at Roy's mother-in-law's home.

At about 9:00 p.m. or 10:00 p.m., defendant arrived at the home in a car with three other people. Defendant and Roy walked into the residence's closed garage through a

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1 All further statutory references are to the Penal Code.

side door. Inside the garage were two other men: Roy's brother, 20-year old Jesus M. (who lived in the garage), and Roy's friend Miguel A. Miguel was the owner of the revolver that was for sale. The AK-47 was owned by Roy's relative, who was not in the garage.

These four men (defendant, Roy, Miguel, and Jesus) were the only people in the garage during the incident. A short while later, Jesus was dead from gunshot wounds and Roy was injured. Both defendant and Miguel fled before police arrived, and no weapon was found.

Roy, Miguel, and defendant testified at trial. Roy and Miguel said that defendant fired the weapon that killed Jesus and injured Roy, and stole the two firearms. Defendant denied this version of the events, and said he did not steal, or intend to steal, any weapon, and that it was Miguel who inadvertently shot Jesus and Roy when Miguel was attempting to fire his gun at defendant.

We summarize the prosecution and defense cases below.

Prosecution's Case

The prosecution case was presented mainly through the testimony of Roy and Miguel. Roy and Miguel described similar accounts, although they differed in some details. We identify the differences only if relevant to the appellate issues.

According to the prosecution evidence, after Roy and defendant (wearing a backpack) entered the garage, Roy sat down on a couch next to his brother Jesus and placed the AK-47 on his lap. Miguel was sitting on a nearby couch and had his loaded revolver on his lap. When defendant asked to see the revolver, Miguel unloaded the

bullets and handed it to him. Defendant said the revolver was rusty and not worth the asking price ($500) but that one of the people in the waiting car might be interested. Roy walked outside with defendant, and he showed the gun to the people in the car but no one wanted to purchase the weapon.

When defendant and Roy returned to the garage, defendant gave Miguel back his revolver. Miguel then put the bullets back into the gun. Defendant took out a chrome handgun from his backpack and said this was the quality of gun he was interested in purchasing. The gun looked like a semiautomatic weapon. Defendant then put the chrome gun back into his backpack. Defendant was standing in front of a washing machine and dryer near the side door, facing the other three men who were all seated on the couches.

Defendant then asked to again see Miguel's revolver, and Miguel handed it back to him. The testimony was conflicting as to whether Miguel removed the bullets before he handed it to defendant. Miguel thought he removed them, but Roy thought the bullets were still in the gun. Defendant placed Miguel's gun in his pocket.

Defendant then pulled out a pepper spray can from his backpack, and sprayed Roy, Miguel, and Jesus. Roy's eyes were burning but he was able to see that defendant had pulled out a small gun[2] and was attempting to grab the AK-47 that was on Roy's lap. As they struggled with the AK-47, defendant shot Roy in the midsection and right arm. Jesus attempted to get up to swing at defendant, but defendant shot him several times.

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2 Although the evidence was conflicting as to which gun this was, based on the evidence it appears it could have been Miguel's revolver.

Roy fell to the floor after being shot, and Jesus fell on top of him. Defendant and Roy (and possibly Miguel) continued to fight over the AK-47. Defendant finally gained control of the AK-47. Roy then grabbed the handgun that defendant had dropped on the floor, and Roy tried to shoot defendant with the gun, but after pulling the trigger several times he realized it had no bullets left. Defendant pointed the AK-47 at Roy and demanded the handgun. After Miguel yelled for him to give defendant the gun and that it was not worth his life, Roy gave it to defendant.

Defendant fled. A witness thought he saw defendant holding an AK-47 as he left. Miguel then ran out of the garage, and drove away in his car because he was scared and in shock. About two days later, Miguel went to a police station and told the officers what had happened. Police officers apprehended defendant about five or six weeks later.

Responding officers observed Roy's gunshot injuries and found Jesus's dead body on the floor of the garage. Jesus had sustained three gunshot wounds, on his shoulder, chest, and back. All three bullets traveled from an upper part of the body to the lower parts, so his body would have been parallel to the gun barrel. Consistent with this evidence and witness descriptions, the prosecution's theory was that Jesus was lunging toward defendant when he was shot.

In searching the garage, officers found a pepper spray can near one of the couches. No shell casings were found, suggesting that a revolver (rather than a semiautomatic weapon) was likely used (a revolver does not discharge casings when it is fired). The officers saw that one bullet had gone through a laundry soap container and had hit a wall near the side door where defendant had been standing.

Defense Case

Defendant testified on his own behalf. He admitted he was present during the incident, but denied he shot Jesus or Roy and denied he intended to, or did, steal the firearms. He claimed Miguel shot these men during the melee.

Defendant said he was in the garage that evening to purchase the firearms from Roy. He said that when Roy showed him the AK-47 he realized this was the same replica gun he had previously modified to appear to be real and had sold to Miguel's cousin. Defendant said he told Roy he did not to want to buy the AK-47 because it was not in good condition. The men then discussed the revolver, which defendant said he also did not wish to purchase.

At that point, Miguel cocked a gun and told defendant he was not leaving. Miguel said that defendant had "burned" his cousin and demanded defendant's money. Miguel pointed his gun at defendant, and Roy pointed the AK-47 at defendant. Defendant dropped his wallet, phone, and cash ($1,200) on the floor. Miguel picked up these items, put them into his pockets, and sat back down.

Jesus, Roy, and Miguel then started arguing with each other about what to do. When their focus was momentarily diverted, defendant pulled out a can of pepper spray and sprayed all three men with it. Jesus jumped up and tried to tackle defendant. As defendant and Jesus wrestled, defendant heard three or four gunshots. Defendant looked and saw Miguel pointing his gun directly at him. Defendant emptied the can of pepper spray into Miguel's eyes and Miguel fired two more shots. At that moment, Jesus was

holding on to defendant, and Roy was "at [defendant's] knees." After the shots were fired, defendant saw Jesus collapse to the ground.

Defendant ran out of the garage's side door and fled. When asked why he did not report the incident to the police, defendant testified, "Why would I? I didn't do anything."

At trial, defense counsel called an expert witness to testify about the detrimental effects of pepper spray on vision when sprayed in a person's eyes, and focused on the evidence that there was a bullet mark in back of where defendant had been standing. The prosecutor conducted a lengthy cross-examination of defendant, in which defendant's credibility was impeached numerous times. He also presented evidence that a person retains some ability to see even after being sprayed with pepper spray.

Charges and Verdict

Defendant was charged with first degree murder of Jesus, and attempted murder of Roy. With respect to Jesus, the People alleged the special circumstance that defendant committed the murder while engaged in a robbery of the firearms. (§§ 211, 190.2, subd. (a)(17)(A).) On the murder and attempted murder charges, the People also alleged that defendant personally and intentionally discharged a firearm and proximately caused great bodily injury and/or death to another person. (§§ 12022.53, subd. (d), 1192.7, subd. (c)(8).)

Defendant was also charged with two counts of being a felon in possession of a firearm (the revolver and the AK-47) (§ 29800), and with the unlawful use of tear gas (§ 22810, subd. (g)(1)).

The jury found defendant guilty of all charges (first degree murder, attempted murder, felon in possession, and unlawful use of tear gas), and found true (1) the special circumstance allegation that the murder was committed during the commission of a robbery; and (2) the enhancement allegations that defendant personally and intentionally discharged a firearm causing great bodily injury and/or death.

DISCUSSION

Defendant contends the court erred in failing to sua sponte instruct on imperfect self-defense.

I. *Applicable Principles of Murder, Voluntary Manslaughter, and Imperfect Self-defense*

The prosecutor relied on two different theories to support the first degree murder charge against defendant: premeditated murder and felony murder. A premeditated murder is an unlawful killing with malice aforethought, premeditation, and deliberation. (*People v. Chun* (2009) 45 Cal.4th 1172, 1181 (*Chun*).) Malice may be express (intent to kill) or implied (intentional commission of life-threatening act with conscious disregard for life). (*Ibid.*)

A felony murder is a killing committed during a specified felony offense (here, a robbery). (*Chun, supra*, 45 Cal.4th at p. 1182.) This theory does not require that the defendant killed with malice. The prosecutor must instead prove the defendant had the felonious intent required for a robbery and that the killing occurred in the commission of that robbery. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1175; see *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 499; *People v. Burney* (2009) 47 Cal.4th 203, 253.) Thus,

the perpetrator of the killing can be found guilty even if the death was unintentional, accidental, or negligent.[3] (*People v. Cavitt* (2004) 33 Cal.4th 187, 197.)

A first degree premeditated murder can be reduced to voluntary manslaughter in limited circumstances that are viewed as negating malice. (*People v. Moye* (2009) 47 Cal.4th 537, 549; *People v. Lasko* (2000) 23 Cal.4th 101, 107-109.) Of relevance here, malice can be negated by the defendant's (1) "sudden quarrel or . . . heat of passion" arising from provocation that would cause a reasonable person to kill, or (2) " ' "unreasonable but good faith belief" ' " that he or she is in imminent danger of great bodily injury or death (imperfect self-defense). (*Lasko*, at p. 108.)

The latter ground for negating malice (imperfect self-defense) requires evidence showing the " 'defendant killed another person because the defendant *actually*, but unreasonably, believed he was in imminent danger of death or great bodily injury . . . .' " (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1048 (*Nguyen*).) Imperfect self-defense "differs from complete self-defense, which requires not only an honest but also a reasonable belief of the need to defend oneself. [Citation.] . . . [I]mperfect self-defense is not an affirmative defense. [Citation.] It is instead a shorthand way of describing one form of voluntary manslaughter." (*People v. Simon* (2016) 1 Cal.5th 98, 132 (*Simon*).)

"Because imperfect self-defense reduces an intentional, unlawful killing from murder to voluntary manslaughter by negating the element of malice, this form of

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[3] The recent changes to the felony-murder law do not affect this case because defendant was alleged to be the actual killer and a major participant in the underlying felony. (See Sen. Bill No. 1437 (2017-2018 Reg. Sess.).)

voluntary manslaughter is considered a lesser . . . included offense of murder." (*Simon, supra,* 1 Cal.5th at p. 132.) Likewise, attempted voluntary manslaughter based on an imperfect self-defense theory is a lesser included offense of the attempted murder crime. (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 49 (*Villanueva*).)

Because voluntary manslaughter and attempted manslaughter are lesser included offenses of premeditated murder and attempted murder, a court must instruct on imperfect self-defense, even in the absence of a request, if there is substantial evidence supporting the theory. (*Simon, supra,* 1 Cal.5th at p. 132; see *Nguyen, supra,* 61 Cal.4th at p. 1049; *In re Christian S.* (1994) 7 Cal.4th 768, 771.) Substantial evidence is evidence that a reasonable jury could find persuasive. (*Simon,* at p. 132; *People v. Waidla* (2000) 22 Cal.4th 690, 735; *People v. McCloud* (2012) 211 Cal.App.4th 788, 807.) "Speculative, minimal, or insubstantial evidence is insufficient to require an instruction . . . ." (*Simon,* at p. 132.) On appeal, an appellate court independently reviews the record to determine whether there is substantial evidence to support the instruction. (*Id.* at p. 133; *People v. Trujeque* (2015) 61 Cal.4th 227, 271.)

Using the CALCRIM pattern instructions, the court instructed the jury on premeditated murder and felony murder, the provocative act doctrine, second degree murder, voluntary manslaughter based on heat of passion, attempted murder, and complete self-defense. The court further instructed the jury on the principles governing a special circumstance allegation of murder committed during a robbery. (See CALCRIM Nos. 700, 705, 706, 730.) But the court did not instruct the jury on imperfect self-

defense. Defendant never asked for the instruction, and there is no indication the instruction was ever discussed during the proceedings.

As explained below, we conclude the court was not required to instruct the jury on imperfect self-defense because there was no evidence to support this theory. Additionally, there was no prejudicial error.

II. *Evidence Did Not Support Imperfect Self-defense Instruction*

The jury was presented with evidence of two different factual scenarios with respect to the murder and attempted murder charges: the prosecutor's version and the defense version. Neither scenario supported an imperfect self-defense instruction.

Under the prosecution's evidence, the three men were sitting on the couch having a discussion with defendant when he suddenly sprayed them with pepper spray and then shot the two men in an effort to steal the AK-47. These facts do not support a conclusion that defendant acted in self-defense, either reasonable or unreasonable.

Under the defense version, defendant denied firing a firearm or being armed, and instead said Miguel used the handgun in his attempt to rob defendant of his $1,200 cash and, in doing so, Miguel inadvertently shot Jesus and Roy during the melee following the pepper spray. In this scenario, defendant did not use a weapon in an act of self-defense that resulted in the death of Jesus or injury to Roy, and thus no self-defense instruction (complete or imperfect) would have been warranted.

Defendant argues the jury was not limited to the two scenarios and could have believed portions of his testimony and portions of the testimony of Roy and of Miguel, and could have concluded that he shot Roy and Jesus because one or more of the men

were pointing weapons at him. We agree a jury may believe only a portion of a witness's testimony. (See *People v. Crooker* (1956) 47 Cal.2d 348, 355; *Villanueva, supra,* 169 Cal.App.4th at p. 53*;* CALCRIM No. 226.) Moreover, we recognize the evidence was unclear as to what precisely occurred in the garage and that the facts showing there were multiple firearms and large cash amounts at nighttime with four young men, some of whom had been smoking marijuana and drinking alcohol, do not lend themselves to evidentiary precision.

But even if there was evidence supporting defendant's current factual theory—that he fired his weapon in response to the threat of deadly force by Miguel and/or Roy—it still would not constitute substantial evidence supporting an imperfect self-defense instruction. Under the theory that defendant shot the two men in reaction to Miguel (and/or Roy) pointing a weapon or weapons at him, there is no basis for the jury to find that defendant *unreasonably* believed he was in imminent danger of death or great bodily injury. If anything, the evidence suggests that such fear must have been reasonable. (See *Nguyen, supra,* 61 Cal.4th at p. 1049 [defendant charged with murder after a "gun battle"; court did not err in giving complete self-defense instruction but declining to give imperfect self-defense instruction where evidence showed the defendant's belief he was in imminent danger was either reasonable or that he did not act from such fear].) On our independent review of the record, there was no evidence to support a plausible scenario that defendant fired the shots in the actual *but unreasonable* belief that deadly force was necessary to defend himself against an imminent danger of death or great bodily harm.

Defendant's reliance on *Villanueva, supra,* 169 Cal.App.4th 41 is misplaced. In *Villanueva,* the defendant claimed he fired his gun at the victim by accident, but the circumstances supported that he could have shot the gun in self-defense based on evidence showing the victim was intentionally driving his van in defendant's direction "in an apparent attempt to run defendant over" after the two had argued earlier in the day. (*Id.* at pp. 52-53.) The court held that, under these facts, the court erred by failing to instruct on self-defense (both complete and imperfect). (*Ibid.*)

In *Villanueva,* a factfinder could have interpreted the evidence to mean that a reasonable person would not have believed the victim's act of driving the car in defendant's direction posed an imminent danger to his life, but that the defendant held the actual belief based on the parties' earlier interactions. (*Villanueva, supra,* 169 Cal.App.4th at p. 52.) In this case, there was no evidence to support a conclusion that defendant fired the weapon *in response to Miguel and Roy pointing their weapons at him* with the honest *but unreasonable* belief that the other men were putting his life in danger.

Defendant argues that because the court instructed on complete self-defense and heat of passion voluntary manslaughter, then "ipso facto" there must have been a basis for a jury to find he acted in "imperfect self-defense." The argument is not legally or factually supported. Complete self-defense—which requires a defendant's belief in the need for self-defense to be both actual and reasonable—applies to a broader range of offenses than does imperfect self-defense. As the California Supreme Court recently observed, where the evidence (if found true) would support only that the defendant would have reasonably believed he was in imminent danger of death or great bodily injury, the

court has no obligation to give an imperfect self-defense instruction, even if it gives a complete self-defense instruction. (*Nguyen*, *supra*, 61 Cal.4th at p. 1049; accord, *In re Christian S.*, *supra*, 7 Cal.4th at p. 783; 1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Defenses, § 82, pp. 523-525 ["[a]n instruction on imperfect self-defense is required only where there is substantial evidence to support the defense, *not whenever a self-defense instruction is given*," italics added].) Similarly, when facts support that a reasonable person would have killed based on heat of passion, the giving of a voluntary manslaughter instruction does not necessarily mean the court must give a voluntary manslaughter instruction based on an imperfect self-defense theory.

Moreover, it is not clear the court here determined (or properly determined) there was a basis for a complete self-defense instruction *to the murder and attempted murder charges*. The court and parties discussed the need for the instruction solely in the context of defendant's use of the pepper spray, and the court used the non-homicide pattern instruction that did not require a fear of imminent danger *to life or great bodily injury* (which benefited defendant because it imposed a less stringent standard for finding self-defense). (See CALCRIM No. 3470.)

III. *No Prejudicial Error*

Even assuming error, the record does not show the error was prejudicial.

The failure to instruct on imperfect self-defense constitutes reversible error only if the defendant establishes it is reasonably probable he would have obtained a more favorable outcome had the error not occurred. (*People v. Gonzalez* (2018) 5 Cal.5th 186, 191, 197-199 (*Gonzalez*); see *People v. Watson* (1956) 46 Cal.2d 818, 836.) In applying

this harmless error analysis, a court must be mindful that the failure to provide the jury with the option of convicting on voluntary manslaughter "creates a specific kind of risk—that the jury, faced with an all-or-nothing choice between first degree murder or acquittal" will convict the defendant of murder even though the prosecution failed to satisfy its burden to prove this crime. (*Gonzalez*, at pp. 191, 200.) But this prejudice may be eliminated if the jury was given other lesser included offense instructions and/or necessarily decided the factual questions posed by the omitted instructions adversely to defendant under properly given instructions, including findings made on special circumstance allegations. (*Id.* at pp. 191, 192, 200.)

In this case, the jury was given instructions on first degree premeditated murder and felony murder, and was not asked to identify the theory underlying the first degree murder finding. But the jury's special circumstance finding that defendant committed the murder while committing a robbery necessarily reflects it found the prosecution met its burden to prove first degree felony murder. (See *Gonzalez, supra,* 5 Cal.5th at pp. 191-192.) This finding establishes that any error in not instructing on imperfect self-defense was harmless because imperfect self-defense does not reduce a *felony murder* to a lesser offense. Because malice is not required for first degree murder based on the felony-murder doctrine, the imperfect defense is inapplicable to this theory. (See *People v. Price* (2017) 8 Cal.App.5th 409, 430; *People v. Tabios* (1998) 67 Cal.App.4th 1, 9 [imperfect self-defense is not a defense to felony murder], disapproved on other grounds in *Chun, supra,* 45 Cal.4th at p. 1199.)

Defendant argues that we cannot consider the special circumstance finding in evaluating prejudice because this finding was not made until the jury found that he "committed murder in the first place." This argument is inconsistent with settled law. The California Supreme Court has repeatedly found the failure to instruct the jury on lesser offenses of first degree premeditated (malice) murder is harmless where the jury finds a felony-murder special circumstance to be true because this finding necessarily means the jury would have convicted the defendant of felony murder even had it been instructed on the lesser offenses to malice murder. (See *Gonzalez, supra*, 5 Cal.5th at p. 200 ["[A] true special circumstance finding requires a jury to find that the killing occurred during the commission of a felony. Accordingly, such a finding necessarily demonstrates the jury's determination that the defendant committed felony murder rather than a lesser form of homicide."]; *People v. Campbell* (2015) 233 Cal.App.4th 148, 167-171 (*Campbell*) [extensive discussion of the applicable high court decisions]; see e.g., *People v. Castaneda* (2011) 51 Cal.4th 1292, 1328; *People v. Elliot* (2005) 37 Cal.4th 453, 476; *People v. Koontz* (2002) 27 Cal.4th 1041, 1086-1087; *People v. Earp* (1999) 20 Cal.4th 826, 886; *People v. Horning* (2004) 34 Cal.4th 871, 906.)

In *Gonzalez,* the California Supreme Court recently addressed the question (not posed in this case), whether this general rule—that a felony-murder special circumstance finding can render harmless the failure to instruct on voluntary manslaughter theories—applies *when* the jury was instructed only on the felony-murder theory (and not malice murder). (*Gonzalez, supra*, 5 Cal.5th at pp. 200-201.) The court recognized that this latter circumstance can raise a potential issue whether the jury's decision on the special

circumstance finding was infected with the all-or-nothing choice provided in the guilt determination. (*Id.* at p. 201; see *Campbell*, *supra*, 233 Cal.App.4th at pp. 172-173.) But the court ultimately held that the jury's other findings relating to the special circumstance determination provided sufficient "insight" that the jury would have found defendants guilty of felony murder even if it had been given the omitted lesser included offense instructions.[4] (*Gonzalez*, at p. 209.)

In this case, we are governed by the general rule that a special circumstance finding can establish harmless error resulting from the failure to instruct on a voluntary manslaughter theory *if* the jury is instructed on both first degree murder theories—felony murder and premeditated malice murder. (See *Gonzalez*, *supra*, 5 Cal.5th at pp. 200-202; *Campbell*, *supra*, 233 Cal.App.4th at pp. 172-173.) In its special circumstances finding, the jury found the prosecution proved beyond a reasonable doubt that defendant committed Jesus's murder while defendant was engaged in the commission of a robbery. When the jury has been instructed as to both felony murder and premeditated malice murder, and makes such a special circumstance finding, it can generally "be said with confidence that the jury would have convicted the defendant of felony murder even if it had been instructed as to lesser offenses." (*Campbell*, at pp. 167-168; see *Gonzalez*, at pp. 200-202.)

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4 In so finding, the court declined to decide whether the *Campbell* court correctly found prejudicial error based on the trial court's failure to instruct on lesser included murder offenses in a situation in which the jury was instructed only on felony murder and not malice murder. (*Gonzalez*, *supra*, 5 Cal.5th at p. 206, fn. 6; *Campbell*, *supra*, 233 Cal.App.4th at pp. 165-174.)

This conclusion is bolstered by the jury's finding that defendant personally and intentionally discharged a firearm causing great bodily injury to Ray and death to Jesus. This finding negated any suggestion that the jury based its conclusion on a provocative act (the pepper spray) or that the jury's verdict reflected a contrived choice between an acquittal and murder. It is likewise significant that the jury was instructed on heat of passion voluntary manslaughter, substantially reducing the risk that it would have convicted defendant of first degree murder based on an all-or-nothing choice. If the jury believed the prosecution did not prove first degree murder, but did not want to absolve defendant of any criminal responsibility for the killing, it could have found him guilty of voluntary manslaughter under a heat of passion theory, but did not.

DISPOSITION

Judgment affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

DATO, J.